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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TATIANA V. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DOREEN E.,

Defendant and Appellant.

D053584

(Super. Ct. No. J515656C/D)

APPEAL from an order of the Superior Court of San Diego County, Yvonne E. Campos, Judge. Reversed and remanded with directions.

Doreen E. appeals the denial of her petition under Welfare and Institution Code¹ section 388 to terminate her mother's status as de facto parent. We reverse the order.

¹ Further statutory references are to the Welfare and Institutions Code.

I

FACTUAL AND PROCEDURAL BACKGROUND

This appeal concerns two of Doreen's five children, Tatiana V., born March 2000, and Alberto F., born March 2002 (together, children). In December 2004 the children and their two older sisters (children's older sisters or girls) were removed from Doreen's care and subsequently adjudicated dependents of the juvenile court on the grounds of inadequate parental supervision. (§ 300, subd. (b).)

In January 2005 the court placed the children in the care of their maternal grandmother (Grandmother). Doreen and Grandmother had a history of mutual acrimony and a contentious relationship. The children's older sisters were also placed with Grandmother. Their placement was not successful because of the poor relationships between Grandmother and the girls.

In February 2006 Doreen tested positive for methamphetamine. She was five months pregnant at the time. The San Diego County Health and Human Services Agency (Agency) detained the baby at birth.

At the September 2006 12-month review hearing, the court granted Grandmother's application for de facto parent status. The court terminated reunification services and set a permanency plan selection and implementation hearing in the children's cases. The Agency recommended Grandmother adopt Tatiana and Alberto.

In October 2006 the court placed the children's older sisters with Doreen. They did well in her care. In March 2007 the court terminated its jurisdiction in those cases. In May the Agency placed the baby in Doreen's care with continued services.

Doreen filed a section 388 petition asking the court to return Tatiana and Alberto to her care. The court denied the petition, terminated parental rights, and selected adoption as the children's permanency plans.

Doreen appealed. This court held the juvenile court erred when it determined there was "no reason" to remove the children from Grandmother; rather, Doreen established changed circumstances in that she was safely caring for the children's three siblings and showed granting the section 388 petition was in the children's best interests. (*In re Tatiana V.* (Mar. 13, 2008, D051007) [nonpub. opn.])

On May 19, 2008, at the direction of this court, the juvenile court returned Tatiana and Alberto to Doreen's care under a plan of family maintenance services.

In July 2008 Doreen petitioned to terminate Grandmother's status as the children's de facto parent. She asserted Grandmother no longer met the requirements for de facto parent status because the children were not living with Grandmother, and Grandmother did not have caregiver information to offer the court. The social worker and minors' counsel supported termination of Grandmother's de facto parent status as being in the children's best interests.

At the August 6, 2008 hearing, the court read and considered the social worker's reports dated July 14 and August 6. The social worker opined that the relationship between Doreen and Grandmother continued to be contentious. The children were noticeably conflicted between their mother and Grandmother, and it was important for the mother to be able to make decisions on the children's behalf. The Agency was aware that the children had a significant relationship with their Grandmother, and the children

wanted to maintain and continue that relationship; however the social worker believed maintaining Grandmother's status as de facto parent was detrimental to the children because of the adversarial relationship between the adults.

The court noted that the children and Grandmother continued to share a significant psychological bond, and Grandmother had attended to the children's needs and provided their day-to-day care for an extended period. All de facto parent status meant was the court could continue to obtain full information about the children from a number of sources. The court stated it could do nothing about the petty, destructive, and poisonous relations between mother and Grandmother that were affecting the children, as well as their siblings. The court found that Doreen did not show changed circumstances and denied her petition.

II

DISCUSSION

A. The Parties' Contentions

Doreen contends the court erred when it denied her petition to terminate Grandmother's de facto parent status. She argues Grandmother's status as the children's de facto parent impacted her role as their primary caregiver and, in view of the conflicts between Grandmother and Doreen, and Grandmother and the girls, Grandmother's continued de facto parent status was detrimental to the children. Doreen further asserts Grandmother no longer was the children's psychological parent and did not have unique information to assist the court in assessing the children's best interests. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1514 (*Brittany K.*.)

The Agency contends the trial court abused its discretion when it denied Doreen's petition. Grandmother no longer met the criteria for de facto parent status set forth by this court in *In re Patricia L.* (1992) 9 Cal.App.4th 61, 66-67 (*Patricia L.*) because she no longer was the children's caregiver and it was unlikely the court would seek evidence from her regarding the children's placement needs. The Agency asserts Grandmother's de facto parent status confused the children and undermined Doreen's ability to function as their primary caregiver.

Minors' counsel joins the arguments of Doreen and the Agency.

Grandmother contends substantial evidence supports the court's determination she qualified for continued de facto parent status. She had provided day-to-day care to the children for an extended period of time, regularly attended dependency hearings, and had unique information about the children that would assist the court. Grandmother argues in view of these circumstances, ongoing friction between herself and the children's mother was not sufficient to terminate de facto parent status, even if it caused the children some distress.

B. Legal Framework for Termination of De Facto Parent Status

"The concept of de facto parent has been judicially created to recognize limited rights in dependency cases for a person who has been found by the juvenile court to have assumed, on a day-to-day basis, the role of a parent, fulfilling the child's physical and psychological needs" for care and affection, and who has assumed that role for a

substantial period.² (*In re Leticia S.* (2001) 92 Cal.App.4th 378, 381, citing *In re Kieshia E.* (1995) 6 Cal.4th 68, 70-71 (*Kieshia E.*); rule 5.502(10); see also *In re B.G.* (1974) 11 Cal.3d 679, 692-693.)

"Whether a person falls within the definition of a 'de facto parent' depends strongly on the particular individual seeking such status and the unique circumstances of the case." (*Patricia L.*, *supra*, 9 Cal.App.4th at pp. 66-67; *In re Leticia S.*, *supra*, 92 Cal.App.4th at p. 381.) These circumstances include "whether (1) the child is 'psychologically bonded' to the adult; (2) the adult has assumed the role of a parent on a day-to-day basis for a substantial period of time; (3) the adult possesses information about the child unique from the other participants in the process; (4) the adult has regularly attended juvenile court hearings; and (5) a future proceeding may result in an order permanently foreclosing any future contact with the adult." (*Patricia L.*, *supra*, at pp. 66-67.)

"[D]e facto parent status does not terminate by operation of law or by any other automatic mechanism except where the dependency itself is terminated." (*Patricia L.*, *supra*, 9 Cal.App.4th at p. 67.) Once the court grants de facto parent status to an adult, the status continues even if the parent regains custody of the child. To terminate de facto

² A de facto parent is entitled to be present at hearings, to be represented by retained counsel or, at the discretion of the court, by appointed counsel, and to introduce evidence. (Cal. Rules of Court, rule 5.534(e), further rule references are to the California Rules of Court.) De facto parent status does not entitle a psychological parent to reunification services, custody or visitation. (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 752, citing *Kieshia E.*, *supra*, 6 Cal.4th at p. 82 [dis. opn. of Kennard, J.].)

parent status, the petitioner has the burden of establishing a change in circumstances which no longer support the status. (*Ibid.*)

Generally, the appellate courts have liberally interpreted the de facto parent doctrine "to ensure that all legitimate views, evidence, and interests are considered" in dependency proceedings, particularly at the dispositional phase. (*In re Kiesha E., supra*, 6 Cal.4th at p. 76.) However, even where one or more of the circumstances set forth in *Patricia L.* apply, the juvenile court may deny de facto parent status where the de facto parent's actions cause "substantial harm" to the child. (*In re Michael R.* (1998) 67 Cal.App.4th 150, 156-157, citing *Kiesha E., supra*, at p. 78 [request for de facto parent status may be denied if applicant has acted in a manner "fundamentally inconsistent with the parental role"].)

We review the court's findings concerning de facto parent status for abuse of discretion. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 257; *In re Leticia S., supra*, 92 Cal.App.4th at p. 381.)

C. The Court Erred When It Denied Doreen's Petition to Terminate Grandmother's Status as the Children's De Facto Parent

We reject Grandmother's argument that because she otherwise qualified for de facto parent status, the "ongoing friction" between herself and the children's mother was not sufficient to terminate de facto parent status, even if it distressed the children. A division of this court has held that the trial court may deny de facto parent status where the de facto parent's actions cause "substantial harm" to the child. (*In re Michael R., supra*, 67 Cal.App.4th at p.157.) Although the facts of this case are not as serious as

those in *In re Kieshia E.*, *supra*, 6 Cal.4th 68, *In re Michael R.*, *supra*, 67 Cal.App.4th 150, *In re Leticia S.*, *supra*, 92 Cal.App.4th 378, *In re Merrick V.*, *supra*, 122 Cal.App.4th at pages 257-258, or *Brittany K.*, *supra*, 127 Cal.App.4th at page 1515, we cannot minimize the significance of the facts and findings presented here. (*In re Merrick V.*, *supra*, at p. 258.)

The evidence presented here showed the children were generally doing well in their mother's care but were noticeably conflicted between their mother and Grandmother. Doreen and Grandmother were not speaking to each other and used the children to communicate their concerns to each other. The social worker reported, "The Agency feels that maintaining the grandmother's de facto parent status will be of detriment to the children because of the mother's and grandmother's adversarial relationship." The social worker opined that Grandmother's de facto parent status undermined Doreen's ability to function as the children's primary caregiver. She recommended termination of Grandmother's de facto parent status.

The court found that the destructive relationship between Grandmother and Doreen affected the children, as well as their other siblings. It previously stated "[w]e need to minimize the conflict and contact between Grandmother and mother, given the history of the case" and ordered Grandmother and Doreen not to make disparaging remarks about the other. At the close of the section 388 hearing, the court characterized the conflict as petty, destructive and poisonous, and stated the adults were passing on their festering relationship to the children. The court told Grandmother and Doreen, "*You tear these children apart when you put them in the middle.*" (Italics added.)

In view of the evidence, the social worker's expert opinion, and the court's own observations, findings and prior orders, we conclude the court erred when it considered Grandmother's status as the children's former caregiver and psychological parent, and the court's need for full information,³ and did not also consider whether the de facto parent's actions caused substantial harm to the children, inconsistent with a parental role. (*In re Michael R.*, *supra*, 67 Cal.App.4th at pp. 156-157; see *Brittany K.*, *supra*, 127 Cal.App.4th at p. 1515 [de facto parent caused substantial emotional distress to the children and undermined their stability and security in foster placement].)

A decision that rests on an error of law constitutes an abuse of discretion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1061.) Because the trial court did not consider the facts within the appropriate legal framework, and the reviewing court is not the finder of fact, we remand the matter for the trial court's full consideration. (*In re V.F.* (2007) 157 Cal.App.4th 962, 973.)

DISPOSITION

The order is reversed. The matter is remanded to the trial court with directions to consider whether the de facto parent's actions cause substantial harm to the children,

³ The lack of de facto parent status does not prevent a relative, on a sufficient showing, from being present and addressing the court at the child's dependency hearings. (Rule 5.534(f).)

inconsistent with a parental role. (*In re Michael R.*, *supra*, 67 Cal.App.4th at pp. 156-158.) Nothing in this opinion should be construed as preventing the trial court from considering the family's current circumstances.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.